D.B. CIVIL WRIT PETITION NO.2246/2004
(M/s. Saraswati Marble & Granite Industries P.Ltd. Vs. UOI & Ors.)

Date of order : 24.8.2006

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Rajendra Mehta, for the petitioner.
Mr. Vineet Kumar Mathur, for the respondents.

This writ petition is directed to challenge the order passed by Central Custom Excise & Gold Control Appellate Tribunal, New Delhi dated 23.2.2001 affirming the order passed by adjudicating authority levying duty on the Marble slabs and tiles alleged to have been removed from the factory of the assessee without payment of Excise Duty and also levying penalty under Section 11AC of the Central Excise Act by holding that the assessee has clandestinely removed the marble slabs from the factory without payment of excise duty in order to evade the levy.

At the time when the proceedings were originally initiated, the department as well as the assessee both were labouring under the impression that cutting of marble blocks into marble slabs and tiles amounted to the manufacturing activity and invited levy of duty under the Central Excise Act in respect of end product removed from factory. On that premise, the contest was carried only about the levy of

penalty. The tribunal reduced the penalty by considering that the assessee has deposited the amount of Duty demanded vide adjudicating order dated 21.11.1997. However, interest liability was not reduced. The order of the Tribunal was made on 23.2.2001.

On September 18, 2003, the Supreme Court in case of M/s. Aman Marbles considered the question whether cutting the marble blocks into the marble slabs amounts to manufacture for the purpose of attracting Duty under Central Excise Act ? The Supreme Court referring to its earlier decision in Rajasthan State Electricity Board Vs. Associated Stone Industries & Anr., JT 2000 (6) SC 522 rendered under Rajasthan Sales Tax Act held as under :

> "it is not possible to accept that the excavation of stones and thereafter cutting and polishing them into slabs resulted in any manufacture of goods."

On this principle, it was held that the activity carried on by the assessee while cutting the marble blocks into marble slabs did not amount to manufacture activity and the activity does not fall under the pale of the Central Excise Act so as to attract the levy of Duty. The levy of Duty was hld to be ultra vires the Central Excise Act and not authorized by law.

Soon after the judgment was rendered by Supreme Court in Aman Marble Industries Pvt. Ltd. Vs. Collector of Central Excise, Jaipur, since reported in 157 ELT 393, the petitioner having discovered the mistake in assessing that levy of excise duty is authorized on manufacture of marble slabs and tiles filed this writ petition challenging the order passed by Central Excise authorities imposing duty on the activity of making marble slabs from marble blocks as falling beyond the pale of Central Excise Act and consequential levy of penalty being ultra vires the provisions of the Act claimed refund of the amount already paid by them and also sought a direction that the respondents do not recover other outstanding amount as a consequence of the levy of duty on activity of cutting of marbles block into marble slabs.

While on the merit of the issue, there is no contention, it is urged by the revenue that since the assessee has not disputed its liability during the pendency of the assessment proceedings and had admitted his liability to Duty, he is now precluded from raising this issue.

We are unable to accept this contention firstly because there cannot be any estoppal against State and secondly it is not a case where only one of the parties was labouring under a mistake and other

was not. As a matter of fact both the parties were labouring under the same mistake that the activity of cutting of marble blocks into marble slabs amounts to manufacture and the duty is leviable. The law has become clear and crystallized by the aforesaid decision of Supreme Court which binds all concerned. That mistake having been discovered after September, 2003 on pronouncement of the judgment of Supreme Court, the petitioner without loss of time has approached this Court for declaration of levy of Duty on the activity of cutting of marble blocks into marble slabs to be ultra vires and consequently the order passed by the adjudicating authority and the appellate authority levying Duty and penalty being contrary to law.

In these circumstances, it cannot be said that the assessee has been negligent in prosecuting his remedy or that he was precluded from any principle of estopple for claiming his relief.

Considering on the first principle embodied in Article 265, for levy and collection of tax, authority of law is needed and the levy and collection without authority of law is ultra vires and void.

In the circumstances, the petition cannot be said to be suffering from latches as until the decision of the Supreme Court, both the parties were

labouring under the same mistake.

Moreover, there being no contest before the Appellate Authority the remedy of appeal was not available to the assessee and in such circumstances, the only remedy was available before the assessee to approach this Court to get his remedy, against ultra vires levy.

It is not a case where the assessee has asked for refund merely on the basis of later judgment of Supreme Court but has come before the Court challenging the order levying Duty and Penalty itself, albeit by invoking extra ordinary jurisdiction, which in the circumstances, he could invoke justifiably.

As a result, we are unable to sustain the objection raised by the learned counsel for the respondents as to maintainability of this petition.

On merit there being no dispute about the fact that in view of law declared by Supreme Court, which binds all concerned, the levy of Duty on the activity of cutting of marble blocks into marble slabs and its collection during the period in question was unauthorized by law, hence cannot be sustained. Since levy of Duty itself was ultra vires, any penalty in respect thereof also could not have been imposed. Hence levy and collection of penalty, which is only

incidental to substantive levy, cannot be sustained.

We may notice here that the provisions of Central Excise Act vide Finance Act, 2006 included the activity of cutting stones into slabs and tiles in the activity of manufacture by creating a legal fiction and has been brought under Tax net. However, such amount has not been given effect to retrospectively, therefore, it was not given affect the merit of petitioner's case.

Consequently, the writ petition is allowed. The orders adjudicating demand of Excise Duty and levy of penalty for non-payment of such Duty are quashed. In the circumstances, the recovery of any outstanding sum of Duty, interest and Penalty against the assessee as a result of the impugned levy orders and demand notices cannot be made and the respondents are restrained from doing so. So far as the amount already recovered from the assessee will be subject to refund under Section 11-B of the Act for which the assessee may resort to proceedings under Section 11-B. No costs.

(GOPAL KRISHAN VYAS), J. (RAJESH BALIA), J.

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